Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

JOHN PARKER ROE,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

Petition For A Writ Of Certiorari
To The Court of Criminal Appeals
of the State of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Fourteenth Amendment Due Process Clause violated in that no rational trier of fact could have found guilt beyond a reasonable doubt?

2. Was the erroneously admitted hearsay statement in violation of the Sixth Amendment Confrontation Clause and Rules of Evidence harmless error beyond a reasonable doubt?

3. Should the State have been allowed to proceed in violation of Fourteenth Amendment Due Process with a death-qualified jury over defense objection on the grounds that there was no aggravating circumstance and in particular no "torture" when it appeared after the fact that the claim of torture was indeed pretended wife abuse insufficient as later ruled by the court to sustain the "aggravating circumstance"?

4. Was the Trial Judge's denial of the defense testimony of expert witnesses at trial because the defendant refused to discuss the facts of the killing with the court-appointed expert who was not neutral and detached a violation of Fourteenth Amendment Due Process?

PARTIES TO THE PROCEEDING

The Petitioner John Parker Roe is a citizen of the State of Tennessee. The Respondent is the State of Tennessee.

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Petitioner, John Parker Roe, petitions for a writ of certiorari to review the January 12, 1998, Opinion of the Tennessee Court of Criminal Appeals affirming his conviction of first degree murder and sentence of life in prison.

OPINIONS BELOW

The Opinion of the Tennesee Court of Criminal Appeals of January 12, 1998, is unpublished and a copy attached as exhibit "A". The Order of denial of permission to appeal by the Tennessee Supreme Court, January 4, 1999, is attached as exhibit "B".

JURISDICTION

This Petition seeks review of the Opinion entered by the Tennessee Court of Criminal Appeals of January 12, 1998. Petitioner seeks to invoke the jurisdiction of this Court to review this Opinion pursuant to 28 U.S.C. § 1257 as this was the court of last resort in this matter.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The issues in this application for writ of certiorari involve the Due Process Clause of the Fourteenth Amendment. See Appendix C.

STATEMENT OF THE CASE

A. *Procedural Posture*:

On January 12, 1998, the Tennessee Court of Criminal Appeals at Jackson, Paul J. Summer, Judge, and Judges John H. Peay and David G. Hayes concurring, entered an opinion affirming the conviction of John Parker Roe in the Shelby County Circuit Court for the September 16, 1994, murder of his wife, Michelle Roe. At that time, John Parker Roe was an officer of the Memphis Police Department and the defense contended that he shot her by accident as the result of toxic psychosis from the abuse of mini-thins (ephedrine) that he was using to keep awake as a Memphis police officer.

On January 4, 1999, the application for review by permission under Tennessee Rules of Appeallate Procedure (Rule 11), of that judgment was denied. See Appendix B. The Court of Criminal Appeals had found error in the admission of hearsay evidence, but held it harmless error. The Court of Criminal Appeals opinion had also admonished the state for improperly seeking the death penalty upon an aggravating circumstance (torture) that did not exist, but did not reverse.[1]

B. *Facts*:

The proof showed that John Parker Roe, an officer of the Memphis Police Department shot and killed his wife, Michelle Roe, September 16, 1994, in Shelby County, Tennessee. The night before, officer Roe began a telephone

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1. This was the first case in Tennessee history to be nationally televised by Court TV under a pilot program of the Tennessee Supreme Court to allow live coverage.

conversation with a fellow Memphis police officer (Fowler) and the conversation continued until about 4 o'clock a.m. the next morning -- the day of the shooting. The conversation was concluded and then Fowler received another telephone call from Roe, asking that he come to his residence "quick". Upon arriving, officer Fowler described a "Doctor Jekyll Mr. Hyde" transformation of officer Roe -- his friend. There was a bizarre conversation with Fowler in which Roe's wife was discussed and one of the comments that Roe made to Fowler was "it went bang when it should have gone click." Officer Fowler was able to talk Roe into allowing Fowler to leave the premises as Fowler was afraid of Roe and Fowler left and contacted other law enforcement officers who soon arrived and confronted Roe and at trial these officers also described bizarre behavior that supported the defense claim (along with the testimony of Fowler) that Roe was *insane*. There was a series of other witnesses, police officers and paramedics, whose lay testimony upon defense cross-examination also supported the claim of insanity, including an EKG test and an examination by the paramedics.

Roe was taken to a hospital where he was seen by a police major Keenan who knew Roe personally and at trial described that Roe was in the floorboard of the back seat of the police car and had the appearance of being mentally ill or psychotic as opposed to intoxicated or some other state of mind. Police Major Keenan was of the opinion that Roe could not "consent" to any test and Roe was therefore removed to the jail where he was observed by a jailer who testified on behalf of the defense that Roe was "suicidal". The

jailer also testified that Roe was kept under close watch, wore paper clothes for a week and was incoherent. He also testified that Roe continued under supervision and at present (time of trial) was "coherent".

Defense lawyer Ted Hansen supported the defense and testified to support the claim of insanity.

There were no eyewitnesses to the shooting, but it took place at the couple's home in Shelby County, and the deceased was found in the bed, dead, as a result of a single gunshot wound to the head, apparently by Roe's police service revolver.

The defendant refused to be examined by the state's expert after having served the state with a "notice of insanity" defense because the so-called expert was not neutral and detached, but rather was a personal friend of *the* prosecutor Thomas Henderson!! The state sought the death penalty over the vigorous objection of the defense and never revealed the claimed aggravating circumstance until after the defendant was convicted with a "conviction prone" or death qualified jury, despite repeated and numerous efforts by the defense to discover the alleged "aggravating circumstance". The trial judge thereafter ruled that the state had failed in its burden with respect to an aggravating circumstance and it appeared that the "aggravating circumstance" was nothing more than claimed wife or spouse abuse of a minor nature!!

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE FIRST DEGREE MURDER

CONVICTION UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE BECAUSE OF A FAILURE TO ESTABLISH THE ELEMENTS PREMEDITATION, DELIBERATION AND SANITY AS REQUIRED BY APPLICABLE TENNESSEE SUBSTANTIVE LAW.

WAS THE EVIDENCE SUFFICIENT AS TO PREMEDITATION, DELIBERATION AND SANITY?

The trial of John Parker Roe for the killing of Michelle Roe on September 16, 1994, was under *State v. Jackson*, 890 S.W.2d 436 (Tenn. 1994) where the Supreme Court held that if the evidence raises a reasonable doubt as to the defendant's sanity, the burden of proof falls upon the state to establish the defendant's sanity beyond a reasonable doubt. See, also, *Stacey v. Love*, 679 F.2d 1209 (6th Cir.), *cert. denied*, 459 U.S. 1009 (1982). This, of course, is not the law today in Tennessee, but it was the law at the time of the homicide, September 1994. Thus, the question is, did the state prove beyond a reasonable doubt sanity if the evidence raised a reasonable doubt? We submit there was a failure of proof as to sanity since the testimony of the lay witnesses clearly established "reasonable doubt" as to sanity. Consider the sequence of witnesses, including Officer Fowler and the other officers who arrived on the scene, including Major Keenan at the hospital, the paramedics, the jailer at the jail, and, finally, defense counsel Hansen. All the witnesses described an incoherent person who was out of contact with

reality, and psychotic, and certainly there was a question or reasonable doubt raised. Furthermore, premeditation and deliberation were absolutely not proven as separate elements of the substantive definition of first degree murder as required by *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992).[2] There was no "confession" or statement concerning the actual shooting and there were no eyewitnesses and we are left with, what happened? *There is absolutely no evidence that the killing was premeditated or deliberate.* Laying aside the question of the sanity of John Parker Roe. The evidence simply shows that a Memphis police officer (husband) shot and killed his wife in the bedroom of their home, as she was found lying in the bed with a single gunshot wound to the head. Where is the evidence of premeditation and deliberation? This is, at the very most, a case of second degree murder. See *Witt v. State*, 46 Tenn. (6 Cold.) 5 (1868).

Under *Jackson v. Virginia*, the proof failed as to all three points or elements: premeditation, deliberation, and sanity. See *Jackson v. Virginia*, 443 U.S. 307 (1979): no rational juror would have found the defendant guilty under these circumstances, *contra* to the ruling of the Tennessee Court of Criminals in Its opinion on January 12, 1998.

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2. At the time this killing was committed (September 1994) Tenn. Code Ann. § 39-13-202(a)(1) (1991) provided that the "intentional, premeditated and deliberate killing of another" constitutes first degree murder. The definition was amended in 1995 and first degree murder is now defined as "the intentional and premeditated killing of another." Tenn. Code Ann. § 39-202(a)(1) (1991 & Supp. 1996).

At the time of the killing (September 1994), T.C.A. § 39-13-202(a)(1) (1991) provided that the "intentional, premeditated and deliberate killing of another" was first degree murder. A premeditated act was defined as "one done after the exercise of reflection and judgment." T.C.A. § 39-13-201((b)(2) (1991). A deliberate act was defined as "one performed with a cool purpose." T.C.A. § 39-13-201(b)(1) (1991). Determination of culpable mental states, such as premeditation and deliberation, can be inferentially made from the circumstances surrounding the killing. *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707, 711 (1950); *Taylor v. State*, 506 S.W.2d 175, 178 (Tenn. Crim. App. 1973). Where are these inferences?

In *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992) and *State v. West*, 844 S.W.2d 144 (Tenn. 1992), this Court discussed these elements of first degree murder. in *Brown*, the Supreme Court acknowledged that the Tennessee courts had often commingled the elements of premeditation and deliberation. The court relied upon the following historical definitions:

> "Premeditation" is the process simply of thinking about a proposed killing before engaging in the homicidal conduct; and "deliberation" is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. "Deliberation" is present if the thinking, i.e., the "premeditation" is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a "careful weighing" of the proposed decision.

Brown, 836 S.W.2d at 540-41 (quoting C. Torcia, *Wharton's Criminal Law* § 140 (14th ed. 1979) (emphasis in original)); see,. also, *State v. Gentry*, 881 S.W.2d 1 (Tenn. Crim. App. 1993).

Premeditation thus requires evidence of a "previously formed design or intent to kill," and deliberation requires "some period of reflection, during which the mind is free from the influence of excitement or passion." *West*, 844 S.W.2d at 147. To ensure that the elements would be considered separately, the court in *Brown* deemed it prudent to abandon a commonly given instruction that premeditation could be "formed in an instant." *Brown*, 836 S.W.2d at 543. *Gentry* considered the nature of proof from which a jury might rationally infer the elements of first degree murder:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in

activity directed toward the killing, that is, *planning activity*;

(2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and

(3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

881 S.W.2d at 4-5 (-quoting 2 W. LaFave and A. Scott, *Substantive Criminal Law*, § 7.7 (1986) (emphasis in original).

CONVICTION OF FIRST DEGREE MURDER SHOULD ALSO BE SET ASIDE BECAUSE OF DIMINISHED CAPACITY

Under *State v. Phipps*, 883 S.W.2d 138 (Tenn. 1994), the defense of diminished capacity has been recognized in Tennessee. Conceptionally distinct from insanity, a diminished capacity defense attempts to reduce the severity of the charge by challenging the mental element of the prosecution's *prima facie* case. For example, distinctions between murder and manslaughter often hinge on whether the prosecution can show that the crime was committed intentionally, knowingly, recklessly, or negligently. Unlike the insanity defense, which admits the criminal act but asserts the defendant had no criminal intent, the diminished capacity defense attempts to show that the defendant was able to form *less* than the criminal intent required by the charge. Certainly

this is the case with John Parker Roe, and on appeal, under *Jackson v. Virginia*, the conviction of first degree murder should also have been set aside by the Tennessee Court of Criminal Appeals on this grounds alone.

As recognized in *Phipps*, the diminished capacity defense is a rule of evidence. Recently, this court in *State v. Hall*, No. 03-501-9701-CR-00010, 12-16-97, discussed this rule of evidence of *Phipps* (p.17):

> In resolving this issue we must revisit a principle recently endorsed by this Court in *State v. Abrams*, 935 S.W.2d 399 (Tenn. 1996). In that case, we approved the "general holding" of *State v. Phipps*, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994), that "evidence of a defendant's mental condition can be relevant and admissible in certain cases to rebut the mens rea element of an offense." *Abrams*, 935 S.W.2d at 402. We deferred until "another day" further development of the rule of "diminished capacity." *Id.* Another day has arrived.

This Court in *Hall* then engaged in a brief historical review: "The rule of diminished capacity originated in Scotland more than a century ago and was designed "to reduce the punishment of the 'partially insane' from murder to culpable homicide, a non-capital offense." *State v. Wilcox*, 435 N.E. 2d 523, 525 (Ohio 1982). The doctrine was widely accepted in other countries before it gained acceptance in American ..."

Hall (p.18):

> It was that proper description of "diminished capacity" that was adopted by the Court of Criminal Appeals in *Phipps*. Indeed, while recognizing that diminished capacity is not an enumerated defense under the 1989 revision of the criminal code. See Tenn. Code Ann. § 39-11-501-621 (1991 Repl. & Supp. 1996), the Court of Criminal Appeals in *Phipps* concluded that a defendant's capacity to form the requisite mental state to commit an offense is an issue in criminal prosecutions because the general criminal law in Tennessee provides that "[n]o person may be convicted of an offense unless ... [the] culpable mental state required is proven beyond a reasonable doubt," Tenn. Code Ann. § 39-11-201(a)(2) (1991 Repl.). We agree with that conclusion, and in addition observe that the negation of an element of a criminal offense is recognized as a defense in Tennessee. Tenn. Code Ann. § 39-11-203(e)(2) (1991 Repl. & Supp. 1996) (A ground of defense, *other than one (1) negating an element of the offense* ..." (emphasis added).

Thus, we strongly disagree with the Court of Criminal Appeals' failure to set aside this first degree murder conviction.

According to the proof, at about 7 o'clock a.m. when Carl Fowler arrived, he saw a "different person" than the police officer he had known for five years. It was a "Doctor Jekyll-Mr. Hyde" change of personality and Roe appeared mentally ill. At about 9 o'clock a.m. when Officer Hughes arrived, he described Roe as sweating like he had "just run

five miles on an August day". [This is September, but no one else is sweating.] "Where is your wife?" She "goes by many names." "In the field or in the house." He was sitting on the tailgate of a truck drinking a beverage, incoherent, out of contact with reality. Officer Chambers goes in the house, finds The body (shot) and reports more incoherent conversation with John about "grass" or "dogs" or "beagles in the bottoms" and "lawn mower not running". He reports that John is sweating profusely. When the ambulance driver arrives to pick up the body of Michelle, an EKG of John Roe is taken and the driver describes him as "abnormal" and "incoherent". [Obviously, the officers were alarmed by John's behavior and requested the EKG.] He was "excited and disoriented" and "under a lot of stress". He had labored breathing. This was the testimony. In fact, the record of the examination has become a part of the record and, we say, is evidence that supports our claim that the proof created a reasonable doubt as to sanity.

John Parker Roe was taken to a hospital (Why?). He was seen there by a Memphis Police Captain Keenan who knew John previously and testified that he talked to him and that John was soaking wet -- flushed -- and that he was in the floorboard and had a "wild-eyed animal look" and was "over the edge". Captain Keenan (promoted to major at the time of trial) was a highly experienced police officer and former SWAT team member and he observed no signs of alcohol or drinking and there was no breath test or blood test taken; thus, any claim that John was "drunk" is false and malicious. Officer Roberts had reported that before John Parker Roe was

removed from the scene that he was in the police car with the air on and the windows up and was still sweating, and couldn't communicate and was talking about "grass" and "dogs".

After John was taken to the jail, he was placed on a "suicide" watch and an experienced jail guard reported behavior consistent with mental illness in that he couldn't communicate or talk, and this witness compared his behavior then with his current behavior in the jail. Finally, John Parker Roe's attorney at the time, Ted Hansen testified that he talked with John at the Criminal Justice Center and that he was unable to communicate and Hansen's testimony supported the defense claim that there was a "reasonable doubt" created as to Roe's sanity, which would relate back to the time of the shooting, between 4 o'clock a.m. and 7 o'clock a.m. that morning.

Thus the proof fails to satisfy Fourteenth Amendment Due Process. If the first degree murder conviction is not set aside, it should at least be reduced to second degree murder -- or manslaughter.

The standard of review as established by the Fifth Amendment Due Process Clause.

In *Jackson v. Virginia*, *supra*, this Supreme Court said that to review on habeas corpus state convictions under the Fourteenth Amendment the standard was:

> No rational trier of fact could reasonably conclude guilt beyond a reasonable doubt.

Jackson v. Virginia, *supra* held:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt....This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

In re Winship, 397 U.S. 358 (1970) had established that the Fourteenth Amendment Due Process Clause prohibits criminal conviction except upon proof beyond a reasonable doubt. The Opinion of the Tennessee Court of Appeals of January 12, 1998, Opinion, Appendix A, affirming the conviction, overlooked, or misapprehended the standard of review applicable to such conviction by virtue of the United States Supreme Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1997).

The United States Supreme Court in *In re Winship*, *supra*, held that the United States Constitution prohibits criminal conviction except upon proof beyond a reasonable doubt. [The constitutional standard in federal and state cases is obviously the same.] The standard of review for sufficiency of the evidence is that the court must view the evidence as to whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See, again, for example, *United States v. Warren*, 18 F.3d 602

(8th Cir. 1994), where the Eighth Circuit (for example) holds that the court must affirm a conviction unless it concludes "that a reasonable fact finder could not have found guilt beyond a reasonable doubt." See, also, *United States v. Ortiz*, 23 F.3d 21 (1st Cir. 1994); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994); *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Bergman v. McCaughtry*, 65 F.3d 1371 (7th Cir. 1995); and *United States v. Edmonds*, 103 F.3d 822, 824-25 (9th Cir. 1996).

We do not object to the review of the evidence and the inferences that may reasonably be drawn "in the light most favorable to the verdict." Under this test, the evidence simply fails. *See Coffin v. United States,* 156 U.S. 432 (1895).

The Due Process Clause precludes states from discarding the presumption of innocence. *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2417 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977)

REASONABLE DOUBT

The concept of proof beyond a reasonable doubt was established at common law before the adoption of the Sixth Amendment. As with the presumption of innocence, the states took the lead in requiring proof beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358, 372 (1970) (Justice Harlan) McCormick, *Evidence* 962-963 (3d ed 1984).

> The Constitution does not mention... the presumption of innocence nor does it say that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt

was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue.*Johnson v. Louisiana*, 406 U.S. at 381 (Douglas, J.,dissenting)

Mr. Justice Douglas refers, of course, to *In re Winship*, 397 U.S. 358 (1970).

Justice Brennan began his analysis in *Winship* by expressing the Court's concern for the inevitability of error in decision-making. He quoted from his earlier opinion for the Court in *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "There is always in litigation a margin of error, representing error in fact-finding...." The reasonable doubt standard (he said) "is a prime instrument for reducing the risks of convictions resting on factual error." 397 U.S. at 363. Justice Brennan then expressed the importance of certainty in decision-making to three groups: (1) the triers of fact, (2) society as a whole and (3) criminal defendants, and concluded as to each that the reasonable doubt standard was indispensable. As to the trier of fact, "the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" 397 U.S. at 364. As to the general citizenry, "use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. As to those suspected and accused, "It is also important in our free society that every

individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." *Id.*

As a result of *Winship*, the burden of proof always rests upon the prosecution. It never shifts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) See, also, *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Yates v. Evatt*, 500 U.S. 391 (1991). Moreover, as a result of *Winship* and *Jackson v. Virginia*, 443 U.S. 307, 321, n.14 (1979), there has been a revolution in the appellate courts in evaluating the sufficiency of evidence to sustain convictions. 443 U.S. at 307. Although nominally setting a review standard for federal *habeas corpus* review, the standard established in *Jackson* has been generally applied to all sufficiency of evidence claims on appeal. The standard flows directly from *Winship* and in fact was seen by the *Jackson* Court to be a necessary complement to *Winship*. 443 U.S. at 313-318 The standard for appellate review of insufficiency of evidence claims set forth in *Jackson* is: a criminal conviction cannot be sustained if, on review of the trial record in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. 443 U.S. at 324.

In conclusion, due process of law today as yesterday requires that in a criminal proceeding the state prove "beyond a reasonable doubt... every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358 (1970); see also, *Sullivan v. Louisiana*, 508 U.S.

275 (1993). A conviction founded on less than sufficient proof of every element of the charged offense violates the accused's right to due process of law and thus cannot stand. *Jackson v. Virginia*, 443 U.S. 307 (1979). In reviewing the sufficiency of the evidence, the appellate court must take the evidence in the light most favorable to the State and grant the State all reasonable inferences from the evidence. The state must nonetheless prove all requisite facts. Inferences are permitted, but presuming the existence of an element of a crime is not permitted; guilt must be proved. *Francis v. Franklin*, 471 U.S. 307 (1985)

Due process requires that a criminal defendant convicted on less than sufficient evidence be discharged. *Osborne v. Ohio*, 495 U.S. 103 (1990). This case must be reversed The evidence simply fails as to each of these elements.[3]

SECOND QUESTION

THE ERRONEOUSLY ADMITTED HEARSAY STATEMENT UNDER TENNESSEE ADJECTIVAL LAW ALSO VIOLATED THE SIXTH AMENDMENT RIGHT TO CONFRONTATION AND WAS NOT HARMLESS ERROR BEYOND A REASONABLE DOUBT

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3. It has long been the rule that "where the government's evidence is equally strong to infer innocence of the crime charged as it is to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal." See *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971).

The Tennessee Court of Criminal Appeals in Its January 12, 1998, opinion finds that the introduction of this evidence concerning the "state of mind" of the deceased Michelle Roe, was, indeed, error, holding:

> This was error. However, because the evidence as to premeditation and deliberation is overwhelming, we conclude that any error was harmless. Tenn. R. Crim. P. 52(a)

The defense strenuously objects because this was not harmless error *beyond a reasonable doubt* because there was no proof of premeditation and deliberation. The proof was that the police found the body of Michelle Roe in the bed and upon examination later it was concluded that she died from a single gunshot wound to the head. There was *no* evidence whether this was suicide, an accident, or the result of passion, or as a result of premeditation and deliberation. Where is the proof that the Court claimed in Its opinion, on page 21, that the "premeditation and deliberation is overwhelming." Not only was it not overwhelming, it didn't exist period!!!

The statement of the deceased was rank hearsay[4] and

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4. In fact, Rule 803(4) of the Tennessee Rules of Evidence was violated on its face: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." [From Comments] "The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception. It views decisions such as *Ford v. State*, 184 Tenn. 443, 201 S.W.2d 539 (1945), as based on faulty

highly prejudicial and since the defense objected on the grounds of hearsay and the Sixth Amendment Confrontation Clause and was not able to confront and cross examine, obviously, the deceased, the Trial Judge's error was extremely harmful and prejudicial.

If a trial court errs in admitting hearsay under the evidentiary rules, the appellate court must review the error under a (simple) harmless error standard. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). If the statement was inadmissible under the Confrontation Clause, however, the appellate court must apply a higher standard of review -- harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 24 (1967). See also *Gilbert v. California*, 388 U.S. 263 (1967); *Fahy v. Connecticut*, 375 U.S. 85 (1963). "The principal of fundamental fairness in a court of law is necessarily defined and shaped by the rules of evidence." *United States v. Delano*, 825 F.Supp 534, 545 (W.D.NY 1993). The United States Supreme Court has long held that "[e]stablished rules of ... evidence [are] designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *United States v. Blumberg*, 961 F.2d 787, 789 (8th Cir. 1992). Accordingly, it is a "fundamental premise of any trial that the ultimate decision rests solely upon evidence presented by the parties *within the confines of the rules of evidence*." *Scott v. Ohio*, 480 U.S. 923, 925 (1987) (emphasis added). Tennessee constues the hearsay rule

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analysis."

exceptions rather strictly. See and compare *State v. Livingston*, 907 S.W.2d 392 (Tenn. 1995)

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused to confront and cross-examine witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965). The Supreme Court has recognized that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); but cf. *Coy v. Iowa*, 487 U.S. 1012 (1988). In *Davis* the Court further held that the cross-examiner's right to discredit the witness through impeachment is an important component of that right of confrontation. See also *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

DEFENDANT'S RIGHT
TO PHYSICALLY CONFRONT WITNESSES

The Sixth Amendment right to "confront" the witnesses against him generally means the defendant has a right to a face-to-face encounter[5] The Supreme Court reaffirmed this right in *Coy v. Iowa*, 487 U.S. 1012 (1988), when it reversed a conviction after the trial judge had permitted the placement of a screen between the defendant and two child witnesses in a child sex abuse case. Writing for the Court, Justice Scalia noted:

> The perception that confrontation is essential to fairness has persisted over the centuries because there

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5. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.

is much truth to it. ... It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. ... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. *Id.* at 1019-20

Since the declarant Michelle Roe was deceased and not a witness there was a confrontation violation. See *United States v. Owens*, 484 U.S. 554 (1988). This was not just a matter of inadmissible hearsay. The Sixth Amendment Confrontation Clause was violated.

There are three basic standards under which prejudice arising from trial error is weighed, but the majority of constitutional error must be shown to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). The opinion of the Court of Criminal Appeals does not state what standard of review was applied. The error, however (we contend) was not harmless error beyond a reasonable doubt.

THIRD QUESTION

THE TRIAL JUDGE SHOULD NOT HAVE DENIED THE DEFENSE THE TESTIMONY OF EXPERT WITNESSES AT TRIAL BECAUSE THE DEFENDANT REFUSED TO DISCUSS THE FACTS OF THE KILLING WITH THE COURT-

APPOINTED EXPERT WHO WAS NOT NEUTRAL AND DETACHED BECAUSE THIS DENIED THE DEFENSE THE CONSTITUTIONAL RIGHT TO A DEFENSE.

During the course of the trial, it appeared that the "neutral and detached" expert appointed by the Court on behalf of the state, was indeed a personal friend of the chief prosecutor of the case, Thomas Henderson, who was improperly seeking the death penalty. The defense objected and the defendant refused to be examined or questioned by the state's expert, or, that is, to provide her a statement. In fact, she gave him a *Miranda* warning and he refused to answer after the *Miranda* warning!! See *Estelle v. Smith*, 451 U.S. 454 (1981). At no time did the defense refuse for him to be examined as to clinical tests (e.g., MMPI) and scientific observations, but only refused, specifically, to provide the expert his statement as to the facts and circumstances surrounding the killing because neither the defense lawyers nor the defendant "trusted" this expert with such information. Certainly there was no duty to reveal this information prior to the state being required to prove beyond a reasonable doubt each of the elements of the killing.

Obviously, under *Estelle v. Smith*, 451 U.S. 454 (1981)[6], there are constitutional safeguards which arise with

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6. Estelle, involved a psychiatrist's examination of a defendant's competency to stand trial. The defendant was not advised of his privilege against self-incrimination, nor was the lawyer informed of the examination. The psychiatrist did not testify at trial regarding the crime at issue. At the post-trial sentencing hearing, however, the psychiatrist gave his opinion that the defendant was

respect to the defendant's right against self-incrimination. It is impossible under these circumstances -- the examining doctor expert being a personal friend of the prosecutor -- for his rights to be safeguarded, and only a *fool* would submit to such an examination. John Parker Roe simply exercised the *WARNING* that the state expert gave him and elected to remain silent. The record clearly reveals that this warning was given. This is not an issue.

A defendant has a right to testify and he may offer into evidence relevant items to prove his non-criminal intent. The right to testify and to call witnesses is an essential part of due process. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); see, also, *United States v. Lueben*, 812 F.2d 179 (5th Cir. 1987); *United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987); and *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985).

The Sixth Amendment provides that the defendant in a criminal case has a constitutional right "to have compulsory process for obtaining Witnesses in his favor." U.S. Const. amend. VI. In *Washington v. Texas*, 388 U.S. 14 (1967), the

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likely to commit future crimes. Chief Justice Berger, writing for the Court, noted that, during the psychiatric evaluation, the defendant "assuredly... was 'not in the presence of [a person] acting solely in his interest.'" Rather, the psychiatrist's apparent neutrality changed, and he became at the sentencing trial essentially "an agent of the State recounting unwarned statements made in a postarrest custodial setting." Accordingly, the defendant's Fifth and Sixth Amendment rights had been violated, and the sentence was vacated. We argue strenuously that Estelle is authority for John Parker Roe's position and does not support the state's position in this case.

Court noted that "[t]he right to offer testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense." More recently, the Court noted in *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987): "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."

The Sixth Amendment protection is buttressed by the broad requirement of fundamental fairness that the Due Process Clause imposes. As the Supreme Court acknowledge in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), in its discussion of the Due Process Clause: "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

THE DEFENSE EXPERTS

The omitted defense due to His Honor's ruling was toxic psychosis. Ephedrine can produce unwanted physiological effects such as aggressiveness, poor judgment, and tremors, and this knowledge is commonly available. The evidence below at trial was that John Parker Roe was consuming large amounts of legally obtained ephedrine in connection with his employment as a Memphis police officer. [Ephedrine also is the central ingredient in the illegal drug methamphetamine or speed.] These pills, tablets and teas that promise to help people lose weight, build muscle and feel more energy and keep awake, as in the case of John Parker Roe, can also cause psychosis and result in homicide!! Thus,

the defense was denied a constitutional defense by the Trial Judge's erroneous ruling and Fourteenth Amendment Due Process was violated.

FOURTH QUESTION

THE STATE SHOULD NOT HAVE BEEN ALLOWED TO PROCEED WITH A DEATH-QUALIFIED JURY OVER DEFENSE OBJECTION ON THE GROUNDS THAT THERE WAS NO AGGRAVATING CIRCUMSTANCE AND IN PARTICULAR NO "TORTURE" WHEN IT APPEARED AFTER THE FACT THAT THE CLAIM OF TORTURE WAS INDEED PRETENDED WIFE ABUSE INSUFFICIENT AS LATER RULED BY THE COURT TO SUSTAIN THE "AGGRAVATING CIRCUMSTANCE"

Again, we take issue with the Tennessee Court of Criminal Appeals' opinion of January 12, 1998, in denying relief because the state proceeded with a death-qualified (or conviction prone) jury from the beginning without revealing to the defense, despite numerous requests, motions and controversy (over a period of years) to obtain this information and revealed only after the fact, after the conviction, that the nature of the so-called torture was in fact minor domestic abuse!!! There being absolutely no grounds to this claim, the defense moved [again after the Court ruled that there was no "aggravating circumstance"] for the conviction to be set aside, just as the defense had opposed the prosecution from the beginning, and for a new trial.

DEATH QUALIFIED JURY

While the defense did not prove that the jury was "conviction prone,[7]" there is no question that it was a death qualified jury which is just as onerous. No defense lawyer "worth his salt" or judge with experience would agree that a death qualified jury (under these circumstances) made no difference. [All experienced defense lawyers would indeed argue that such a jury is "conviction prone".] Obviously, death qualified jurors are different and do not represent a true cross-section of society so as to have a jury trial of peers as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as otherwise required by law. The defense contends that this was a serious error and should result in a reversal of the conviction and we seek review by the Tennessee Supreme Court under Rule 11 of this important issue. In fact, the opinion of January 12, 1998, chastises or admonishes rather seriously the prosecution, as set forth on page 16 of the opinion:

> While we fail to find that the prosecution acted in bad faith, we admonish the state for pursuing the death penalty based upon the aggravating circumstance of torture, which consisted of alleged instances of abuse occurring months before the victim was killed. At

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7. See and compare *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985) and *Grigsby v. Mabry*, 785 F.2d 226 (8th Cir. 1985) (en banc), reversed sub nom. *Lockhart v. McCree*, 476 U.S. 162 (1986).

trial, the state admitted that it had no legal authority for its position, and conceded its position when questioned by the trial court, which later ruled in favor of the appellant after hearing the evidence provided by the state.

Furthermore, we must note that the state had only one aggravating circumstance, torture, on which it based its decision to seek the death penalty. Our Supreme Court defined torture in *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985), as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." We find it difficult to believe that the prosecutors actually believed that instances of alleged abuse that occurred months before the victim's death could be considered torture as defined by our highest court. Although we conclude that the prosecutors' actions did not affect the verdict in this case, they would be well advised to refrain from using such weak aggravators in future trial.

This was not "bad faith"?: Shades of Uncle Remus, Brer Rabbit, and Tar Baby, too!

ANALOGY

The prosecutor's misconduct can be compared to misconduct of a defense lawyer. The Supreme Court recognized, *Taylor v. Illinois*, 484 U.S. 400 (1988), in certain extraordinary circumstances, usually involving "willful and blatant" defense lawyer misconduct, that exclusion by the

Court of defense evidence may be permissible.[8] In *Taylor*, defense counsel had violated discovery rules by not disclosing the name of a defense witness even though counsel had visited the witness the week before trial began and had known his name for much longer. In those circumstances, the Supreme Court held that if the failure to disclose "was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence," exclusion would be "entirely consistent" with the purposes of the compulsory process clause. *Id.* at 415. [The *Taylor* Court also noted, however, that the Sixth Amendment permitted exclusion as a sanction only where it was not "unnecessarily harsh". *Id.* at 416. See, also, *Michigan v. Lucas*, 500 U.S. 145.]

The prosecutor's conduct likewise was intentional. It was to gain over John Parker Roe tactical advantage: death-qualified jurors! They require less evidence to convict. All experienced lawyers and judges know of this bias. This was "bad faith" but we insist a showing of "bad faith" should not even be required.

PROSECUTORIAL MISCONDUCT

As violation of due process, see and compare *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990); *Guidroz v.*

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8. Not all courts even require "bad faith" as a prerequisite for imposing exclusion as a sanction. See United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) ("we agree with those circuits that have treated bad faith as an important factor but not a prerequisite to exclusion").

Lynaugh, 852 F.2d 832, 836-37 (5th Cir. 1988); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990); *United States v. Punitore*, 910 F.2d 1084, 1126 (3d Cir. 1990); *United States v. Hollins*, 811 F.2d 384, 390 (7th Cir. 1987); *United States v. Thirion*, 813 F.2d 146, 157 (8th Cir. 1987). The real question is whether [the comment of] the prosecutor "so infected the trial with unfairness so as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) [quoting *Donnelly v. DeChristofors*, 416 U.S. 637, 643 (1974); see also *United States v. Young*, 470 U.S. 1, 11-12 (1985). Compare: even mere comments cannot be considered harmless error. *United States v. Simpson*, 901 F.2d 1223, 1227 (5th Cir. 1990); *United States v. Krebs*, 788 F.2d 1166, 1176-77 (6th Cir.), *cert. denied*, 479 U.S. 930 (1986)].

In *United States v. Bigeleisen*, 625 F.2d 203 (8th Cir. Minn. 1980), it was misconduct when the prosecutor failed to correct a witness's false testimony and then "capitalized on [that] testimony during closing argument." *Id.* at 208 Even calling defendant a name can result in a reversal. In *United States v. Ries*, 611 F.2d 1335 (10th Cir. 1979), the prosecutor referred to the defendant during closing as "a genuine certified Mr. Big in the heroin business. ..." *Id.* at 1343

United States v. Vetere, 663 F.Supp. 381 (S.D.N.Y. 1987): Though the defendant was ultimately convicted of the crime for which he was indicted, it was misconduct for the Government to mislead the grand jury about the defendant's prior record as well as the motive for the alleged kidnapping. The Court holds that despite the subsequent conviction, the

Government's misconduct before the grand jury authorizes a dismissal of the indictment and a reversal of the conviction. In *Troedel v. Wainright*, 667 F.Supp. 1456 (S.D. Fla. 1986), the defendant's murder conviction was rendered fundamentally unfair by the state's knowing presentation of misleading expert testimony. The Government was aware that the expert's testimony which identified the defendant as the shooter was not based on scientific certainty and did not even reach the degree of probability. The state was also aware that the testimony was crucial not only to a finding of guilt but to the imposition of the death penalty.

We submit that for the prosecutor to seek a death-qualified jury against John Parker Roe was prosecutorial misconduct and unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner John Parker Roe requests that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED
JAN 4, 1999
Clerk of the Courts
Rec'd. By /s/

STATE OF TENNESSEE,	)	
Appellee,	)	SHELBY CRIMINAL
v.	)	
JOHN PARKER ROE,	)	NO. 02C01-9702-CR-00054
Appellant.	)	
	)	
	)	

ORDER

Counsel for the appellant have filed a motion to amend the Rule 11 application previously filed on behalf John Parker Roe. It is hereby ORDERED that the motion to amend is granted.

Upon consideration of the application for permission to appeal, as amended, and the entire record in this cause, the Court is of the opinion that the application should be, and is, hereby, denied.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON
OCTOBER 1997 SESSION

Filed
(Jan. 12, 1998)
Clerk of the Court
Rec'd. by /s/

STATE OF TENNESSEE,	)
Appellee,	) C.C.A. No. 02C01-9702-CR-00054
v.	) Shelby County
JOHN PARKER ROE	) Hon. Jon Kerry Blackwood,
Appellant.	) Judge
	) (First Degree Murder)
	)
	)

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OPINION FILED: /s/ Jan 12 1998

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, John Parker Roe, was convicted by a jury of first degree murder for killing his wife, Lisa Michelle Trainor Roe. Judge Jon Kerry Blackwood sentenced the appellant to life in prison. On appeal, the appellant presents eight issues for our review:

1. Whether the evidence was sufficient regarding premeditation and deliberation and sanity.
2. Whether the trial judge as the thirteenth juror should have set aside the guilty verdict of first degree murder as to the elements of premeditation and deliberation.
3. Whether the indictment should have been dismissed on the grounds of double jeopardy under the Fifth Amendment of the United States Constitution and Article 1, Section 10 of the Tennessee Constitution.
4. Whether the trial court should have denied the appellant's use of expert witness testimony because the appellant refused to discuss the facts of the killing with the state's psychologist.

5. Whether the state should have been allowed to proceed with a "death-qualified" or "conviction-prone" jury over defense objection that there was no aggravating circumstance, specifically torture.

6. Whether the jailhouse conversation between the appellant and his friend should have been suppressed on the grounds that it was illegally intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act, as well as the Fourth Amendment to the United States Constitution.

7. Whether the testimony regarding Michelle Roe's state of mind should have been admitted over the defense's objection.

8. Whether a mistrial should have been granted after the testimony of Penny Mays.

After carefully reviewing the record before us, we affirm the appellant's conviction.

FACTS

John Parker Roe, a Memphis police officer, shot his wife of two years, Lisa Michelle Trainor Roe, in the early morning hours of Friday, September 16, 1994, at their home in Shelby County. Michelle, a student at Shelby State Community College, died as a result of a gunshot wound to the head.

During the spring of 1994, Daniel Kaltreider attended a barbecue in which Michelle and John Roe were present. Sometime during this barbecue, the appellant and Kaltreider, who had not met before, engaged in a conversation. The appellant told Kaltreider that he had a tremendous amount of anger toward his wife and that he kept track of her by checking her odometer. The appellant then stated, "I'm gonna kill her, do you think I could get away with it if I said it was an accidental discharge?" Keltreider replied, "No, I'll have to testify against you in open court." When the appellant then threatened to kill Kaltreider, Kaltreider replied, "I fail to see the humor in that." The appellant then mentioned something about an artery and said, "Well, I'll just have to play crazy for about seven--six months." Kaltreider replied, "No, you'll have to play crazy a lot longer than six months, and by the time you get finished, you will be crazy." Because he wanted to give the appellant the benefit of the doubt, Kaltreider did not report this conversation to the Memphis Police Department. However, upon learning of Michelle Roe's

death, he reported his conversation with the appellant to the Shelby County District Attorney's office.

Later that same year, around June or July of 1994, the appellant called a friend of his, John "Jay" Bamette, and asked him to come to his house. He told Bamette that he and Michelle had been in a fight. He stated that he was afraid she was going to leave him, so he asked Bamette to come over to help calm the situation down. The appellant told Bamette that he had handcuffed Michelle to the bed to prevent her from leaving him. Shortly thereafter, he saw Michelle sitting on the bed with her right hand tied to the bed and her face in her lap. When he saw her face, Bamette could tell she had been crying.

The appellant had previously told Bamette that he and Michelle fought a great deal and that he had thought about killing her. Also, the appellant told Bamette that he had choked her before and had thought about choking her to death. Bamette further testified that he and the appellant frequently engaged in conversations about killing people and disposing of their bodies. Bamette stated that the appellant had talked about killing Michelle and her parents. The appellant told Bamette that he thought Michelle was lying to him and he would check her odometer and follow her to school. Bamette even accompanied the appellant several times when he followed Michelle.

On September 14, 1994, two days before she was killed, Michelle approached Peter Connelly, one of her

teachers at Shelby State Community College, and told him that her husband had abused her and had threatened to kill her. She asked him to call her parents if she did not come to class on Friday. She wrote her parents' phone numbers on a piece of paper and gave the paper to Connelly.

The next day, September 15, 1994, was the appellant's birthday. He had taken the day off from work. At approximately 11:00 p.m., the appellant began a five-hour telephone conversation with a fellow police officer from the Memphis Police Department, Carl Fowler. It apparently was not uncommon for the appellant to engage in lengthy telephone conversations. During this conversation, the appellant indicated to Fowler that he believed Michelle had lied to him about a wedding gift. At trial, Fowler testified that nothing occurred during the conversation which would indicate that anything was wrong. The phone conversation ended around 4:00 a.m. because Fowler was getting tired and the appellant told him that he needed to wake Michelle up for an early class. Except for the appellant, no one knows what occurred at the Roes' home between the hours of 4:00 a.m. and 7:00 a.m.; but Michelle Roe was killed by John Roe during this period of time.

According to Fowler, the appellant telephoned and asked him to come to his house around 7:00 a.m. When he arrived at the appellant's house around 8:00 a.m., the appellant answered the door, and Fowler attempted to go into the house. However, the appellant blocked the doorway.

Fowler asked the appellant three times about Michelle, and after Fowler asked him the third time, the appellant admitted that he shot her, pointing to a bloodstain on the knee of his sweatpants. According to Fowler, the appellant was not wearing a shirt or shoes, only sweatpants. At first, the appellant told Fowler that he had been rabbit hunting with Michelle and had accidentally shot her in the head with his service weapon. The appellant also told Fowler that Michelle was in the bottoms. Fowler told him that they had to call the police, and the appellant irately responded "No."

Meanwhile, Catherine Trainor, Michelle's mother, had received a telephone call from her husband saying that Michelle had not arrived at school. Mrs. Trainor, who was at work, tried to call Michelle at her home, but the telephone was busy. She then asked a friend at work to drive her to Michelle's house. When they arrived at the house around 8:30 a.m., Michelle's car, the appellant's truck, and another vehicle unfamiliar to Mrs. Trainor were in the driveway.

Mrs. Trainor walked up to the front porch and saw the appellant and another man standing on the porch. The appellant introduced Mrs. Trainor to Carl Fowler. The appellant told Mrs. Trainor that Michelle had gone to school. Mrs. Trainor then told the appellant that she had received a call from someone telling her that Michelle had not shown up for school. The appellant told her that Michelle's friend Amy had taken her to school, but Mrs. Trainor knew that the appellant was lying. Amy was the one who called to say that

Michelle was not at school. Because she felt that something was wrong, Mrs. Trainor left to get help.

Fowler told the appellant that he was leaving to call the police, and the appellant said okay. Fowler came upon a motorcycle police officer, William Hughes, as he was driving to a store to call the police. As Fowler was talking to the officer, Mrs. Trainor arrived and spoke with Officer Hughes as well. Mrs. Trainor waited there while the situation at her daughter's house was investigated. Officers returned later and told her that her daughter was dead.

Officer Hughes called for backup, and once Officer Scott Chambers arrived as backup, the two officers went to the appellant's house. When they arrived, the appellant, who had been wearing only sweatpants when Fowler left to get help, was now dressed in blue sweatpants, a white t-shirt, and tennis shoes and was sitting on the tailgate of his truck drinking from a glass. The appellant, who responded to questions by the officers, appeared to be under some stress and was sweating a great deal.

Officer Chambers searched the house while Officer Hughes stayed with the appellant. Officer Chambers found Michelle dressed in her white uniform lying on the bed. A towel had been draped over the top of her head. When Officer Chambers came out of the house, he and Officer Hughes searched the appellant for weapons, handcuffed him, and informed him of his Miranda rights.

The paramedics arrived, but they were unable to get a heartbeat from Michelle. One of the officers asked paramedic Randall Rhodes to examine the appellant because he had been sweating profusely. The appellant told Rhodes that he had not been taking any drugs, but had been under a great deal of stress lately. Although the appellant's vital signs were somewhat high, they were normal for an excited situation. Although Rhodes did not recommend that the appellant be taken to a hospital, the appellant was taken to Memphis Medical Center Hospital. There, he was observed by Major Clyde Keenan, a watch commander with the Memphis Police Department, who was called to the hospital because a Memphis police officer had been arrested. He testified that the appellant was lying in the back of the car, halfway on the seat and halfway on the floorboard. He testified that the appellant appeared to be "over the edge" and had "sort of a wild look about him."

The appellant was taken from the hospital to the Criminal Justice Center in Memphis where he met with his attorney, Thomas Hansom. Hansom testified that the appellant "appeared to be unable to communicate" and "if he [the appellant] did respond in any way it was not coherent."

Elton Douglas, a Shelby County jailer, also testified that he observed the appellant for five days on a "suicide watch." He stated that when asked a question, the appellant would mumble a response. The jailer also testified that since the time when the appellant was first brought to the jail, the

appellant's behavior had changed. He could now ask him a question and get an answer.

Larry Graham, a friend of the appellant's, went to visit him in jail. Because there was a glass window separating Graham from the appellant, the two had to communicate by telephone. Graham testified that while the two were talking, the appellant put down the phone and indicated to Graham that he wanted him to retrieve a bag that was hidden behind the appellant's house. Although Graham tried to find the bag, he was unable to do so and told the appellant. Approximately one week after Graham searched for this bag, the Sheriff's Office called him and asked him to answer some questions about the bag. Graham told the sheriff that the appellant had asked him to look for the bag and that the appellant had told him that he had accidentally killed Michelle.

Steve Scott, a firearms identification expert with the Tennessee Bureau of Investigation, testified that the bullet that killed Michelle was fired from the appellant's service weapon and that the gun and all safety features were in operating condition.

Dr. O.C. Smith, assistant medical examiner, performed the autopsy on Michelle Roe. He testified that the cause of death was a gunshot wound to the right temple. Dr. Smith also noted that the victim had a bruise on the inside of her left wrist and the backs of her elbows had abrasions, as if they had been scraped over a carpet. Dr. Smith also observed abrasions below Michelle's lower lip that occurred after her

death. Dr. Smith further determined from the pattern of blood spatters on the headboard of the bed that Michelle was sitting up when she was shot, although the appellant disputes this assertion. However, when Dr. Smith first saw Michelle, she was fully clothed and was lying on the bed with both feet on the bed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, the appellant argues that the evidence was insufficient as to premeditation and deliberation and sanity. Therefore, his conviction should be reversed or reduced to second degree murder.

The state argues that the evidence is sufficient. It contends that because the appellant admitted to killing his wife, the only issue for the jury to determine was whether the killing was a result of premeditation and deliberation. The state asserts that the jury could infer premeditation from the appellant's use of a gun against an unarmed victim and that the appellant acted deliberately by arranging the victim's body on the bed, by calmly telling Fowler that he had shot Michelle, by calmly telling Michelle's mother that Michelle was at school, and by getting fully dressed after Fowler left to get help. Also, the state contends that the appellant executed his plan to shoot Michelle and then claimed that it was an accident and that he was insane. The state insists that the appellant was unable to raise a reasonable doubt as to his sanity.

A jury found the appellant guilty of murder in the first degree, which at that time was defined as "[a]n intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202 (Supp. 1994). A premeditated act is "one done after the exercise of reflection and judgment." Tenn. Code Ann. § 3913-201(b)(2) (1991). A deliberate act is "one performed with a cool purpose." Tenn. Code Ann. § 39-13-201(b)(1).

Great weight is accorded jury verdicts in criminal trials. Jury verdicts accredit the state's witnesses and resolve all evidentiary conflicts in the state's favor. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Banes, 874 S.W.2d 73, 78 (Tenn. Crim. App. 1993). On appeal, the state is entitled to both the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). Moreover, guilty verdicts remove the presumption of innocence, enjoyed by defendants at trial, and replace it with a presumption of guilt. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). Appellants, therefore, carry the burden of overcoming a presumption of guilt when appealing jury convictions. Id.

When appellants challenge the sufficiency of the evidence, this Court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. Jackson v. Virginia,

443 U.S. 307 (1979); Tenn. R. App. P. 13(e); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985). The weight and credibility of a witness' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978).

The appellant admitted to killing his wife. Several months before he killed her, the appellant told a total stranger, Daniel Kaltreider, that he was going to kill his wife and claim that it was an accident or that he was insane, which the appellant eventually did. Also, the appellant told Jay Bamette that he had thought about killing Michelle by choking her to death, and Bamette and the appellant had engaged in several conversations about how to kill people and then dispose of their bodies. The appellant stated to Bamette the possibility of killing Michelle and her parents. On the day that he killed Michelle, the appellant talked calmly to Michelle's mother, to police officers Hughes and Chambers, and to paramedic Rhodes. The appellant changed clothing after Officer Fowler left to get help.

The jury chose to accredit the state's witnesses on the issues of premeditation, deliberation, and sanity. Based upon the record before us, we see no evidence requiring us to disturb the jury's verdict. The evidence is sufficient. Therefore, this issue is without merit.

THIRTEENTH JUROR

In his second issue, the appellant argues that the trial judge, as the thirteenth juror, should have set aside the guilty verdict of the jury because the evidence was insufficient to prove beyond a reasonable doubt the appellant's sanity. Although the appellant concedes that the trial judge approved the jury's verdict when he ruled on motion for new trial, he still contends that the trial court committed error. In his brief, he asserts that "[t]he trial judge did not set forth any facts or make any findings sufficient to justify this approval and this was error and the conviction should be reversed...." Therefore, the appellant contends that his conviction should be reversed or reduced to second degree murder. The state argues that the trial judge did perform his role as thirteenth juror by approving the jury's verdict. The state asserts that the trial judge was not required to place on the record his findings of fact.

Rule 33(f) of the Tennessee Rules of Criminal Procedure provides what is commonly referred to as the "thirteenth juror" rule:

> (f) New Trial Where Verdict Is Against the Weight of the Evidence.-- The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon request of either

party the new trial shall be conducted by a different judge.

The appellant argues that the trial judge committed error by not making any findings on the record. The proper inquiry is not whether the trial court made any findings on the record, but whether the trial court unequivocally found the evidence sufficient to support the conviction. The appellant even concedes that the trial judge approved the jury's verdict when he ruled on the appellant's motion for new trial. During the hearing for a new trial, the trial judge stated, "[a]s the thirteenth juror, the Court accepts the verdict."

Once the trial court approves the verdict as the thirteenth juror and imposes judgment, the review of the evidence on appeal is quite limited, requiring the accrediting of the testimony of the witnesses for the state and the resolution of evidentiary conflicts in favor of the state. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The trial judge neither equivocated on whether the evidence was sufficient nor expressed dissatisfaction with the judgment. See State v. Dankworth, 919 S.W.2d 52 (Tenn. Crim. App. 1995). Therefore, this issue is without merit.

DOUBLE JEOPARDY

Third, the appellant argues that the indictment should have been dismissed on the grounds of double jeopardy. He asserts that he was "punished twice:" once by the Memphis

Police Department by terminating his employment and again by prosecution of the first degree murder charge. The state argues that loss of employment does not constitute punishment. It maintains that the appellant was fired from his job as a police officer because he violated the policies of the Memphis Police Department, not because he killed his wife.

We must agree with the state that loss of employment from one's job, while undoubtedly disturbing, is not "punishment" as contemplated for double jeopardy purposes. This issue is without merit.

TRIAL COURT'S DENIAL OF EXPERT TESTIMONY

Next, the appellant argues that the trial court erred in denying the defense the testimony of expert witnesses at trial because the appellant refused to discuss the facts of the killing with the state's psychologist. The appellant filed notice of his intention to use insanity as a defense. He contends that his use of pills called Mini-Thins caused him to suffer from "toxic psychosis." The appellant argues that the state's psychologist, Dr. Lynne D. Zager, routinely testified for the state in criminal cases and was a "personal friend" of Tom Henderson, the prosecutor in this case. Furthermore, the appellant argues that he refused to make a statement about the facts of the case to Dr. Zager, rather than refusing to be examined.

The state argues that the trial court property excluded expert witness testimony by defense experts regarding

insanity. The state asserts that this issue is waived because the record on appeal does not contain the preliminary hearing transcript upon which the trial court based its decision to exclude expert witness testimony. Nevertheless, the state addressed this issue in its brief and argued that the trial court properly excluded expert testimony by the appellant pursuant to Rule 12.2(d) of the Tennessee Rules of Criminal Procedure. The state maintains that the appellant, who on advice from counsel, refused to cooperate with Dr. Zager on three separate occasions. Thus, the trial court subsequently found that the appellant had willfully failed to comply with its order that he submit to a psychiatric evaluation by the state's expert and denied the appellant the use of expert witnesses.

Although the preliminary hearing transcript is not included in the record, the order denying expert testimony entered by Judge Lafferty[9] is part of the record before us. Rule 12.2(c) of the Tennessee Rules of Criminal Procedure provides:

> (c) Mental Examination of Defendant.--In an appropriate case the court may, upon motion of the district attorney, order the defendant to submit to a mental examination by a psychiatrist or the other expert designated for this purpose in the order of the court. No statement made by the defendant in the course

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9Judge Blackwood was designated to hear this case after Judge Lafferty suffered a medical emergency.

> of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue respecting mental condition on which the defendant has introduced testimony.

Rule 12.2(d) of the Tennessee Rules of Criminal Procedure states:

> (d) Failure to Comply--if there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

The appellant raised the issue of sanity, yet wanted the court to, in effect, tie the hands of the prosecutors by not having the appellant submit to a mental examination. The appellant argues that he did not refuse to be examined, just

not to discuss the "facts of the case" with the state's psychologist. Rule 12.2(c) clearly protects the appellant's constitutional rights. The appellant made the decision not to comply with Rule 12. He cannot now complain that he was in any way prejudiced. The state, like the appellant, is entitled to a fair trial. State v. Livingston, 607 S.W.2d 489 (Tenn. Crim. App. 1980). This issue is without merit.

DEATH-QUALIFIED JURY

In his next issue, the appellant presents a twofold argument that the jury selection process violated his constitutional rights: the state engaged in misconduct by seeking the death penalty based upon an aggravating circumstance that it knew it could not prove and consequently, acquired a "death-qualified" or "conviction-prone" jury, which prejudiced the appellant. Although the appellant sought a clarification of the aggravating circumstance upon which the state based its decision to seek the death penalty, the state never revealed the nature of the aggravating circumstance until after the appellant was found guilty of first degree murder. The appellant contends that the state wanted to prejudice the jury in its favor by getting a "death-qualified" or "conviction-prone" jury.

The state argues that the decision to seek the death penalty was within the discretion of the prosecutor. In seeking the death penalty, the state attempted to prove the aggravating circumstance of torture through alleged instances

of spousal abuse. The state insists that the appellant has not shown how the state's decision to seek the death penalty based upon an aggravating circumstance of torture was "based upon anything other than the facts of this crime."

In addressing the appellant's argument on this issue, we begin first with his contention that he was prejudiced by the selection of a "death-qualified" or "conviction-prone" jury. The appellant provides no evidence to support his contention that a death-qualified jury prejudiced him. Furthermore, as the state correctly notes in its brief, the United States Supreme Court and the Tennessee Supreme Court have both found that a death-qualified jury could apply the law to the facts. See Lockhart v. McCree, 476 U.S. 162 (1986); State v. McKay, 680 S.W.2d 447 (Tenn. 1984). Thus, we conclude that this issue is without merit.

Next, with regard to the appellant's contention of prosecutorial misconduct, we must agree to some extent. A prosecutor's duty encompasses far more than securing a conviction. His or her role is

> not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done....He [she] may prosecute with earnestness and vigor--indeed, he [she] should do so. But,

> while he [she] may strike hard blows, he [she] is not at liberty to strike foul ones. It is as much his [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78(1935). See also State v. Spurlock, 874 S.W.2d602, 611 (Tenn.Crim.App. 1993); State v. Smith, 803 S.W.2d709,710(Tenn.Crim.App.1990).

While we fail to find that the prosecution acted in bad faith, we admonish the state for pursuing the death penalty based upon the aggravating circumstance of torture, which consisted of alleged instances of abuse occurring months before the victim was killed. At trial, the state admitted that it had no legal authority for its position, and conceded its position when questioned by the trial court, which later ruled in favor of the appellant after hearing the evidence provided by the state.

Furthermore, we must note that the state had only one aggravating circumstance, torture, on which it based its decision to seek the death penalty. Our Supreme Court defined torture in State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985), as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." We find it difficult to believe that the prosecutors actually believed that instances of alleged abuse that occurred months before the victim's death could be considered torture

as defined by our highest court. Although we conclude that the prosecutors' actions did not affect the verdict in this case, they would be well advised to refrain from using such weak aggravators in future trials.

INTERCEPTED CONVERSATION

Next, the appellant argues that his jailhouse conversation with friend Larry Graham was illegally intercepted, thus constituting a warrantless seizure of information. The state, however, asserts that nothing in the record indicates that this conversation was intercepted or how the sheriff's office learned about the context of the conversation, which dealt with hiding a bag of videotapes and sex toys.

The state incorrectly asserts that nothing in the record indicates how the sheriff's office learned about this bag. During the motion for new trial hearing, Lieutenant E. D. Scallions of the Shelby County Sheriffs Department testified, that he had received a telephone call from a woman who refused to identify herself. The woman stated to Scallions that she had talked to Larry Graham's wife and that his wife had told her about a conversation between the appellant and Graham. Scallions testified that Graham was then interviewed and the sheriff's department began looking for a bag that had been placed in the vicinity of the appellant's house.

The state is correct, however, in its assertion that the appellant did not offer any evidence that his conversation with Graham had been intercepted. This fact, coupled with what appears to be a logical explanation regarding how the sheriffs department learned of the bag's existence, leads us to conclude that this issue is without merit.

STATE OF MIND HEARSAY EXCEPTION

The appellant's next issue concerns the testimony of Peter Connelly, who was one of Michelle Roe's teachers at Shelby State Community College. Connelly testified that two days before she was killed

> Michelle came up to me after class, and she stated to me that her husband had abused her and that her husband had threatened to kill her. And she asked me to call her mom and dad if she did not show up for clinic on Friday. And she wrote down the phone numbers of her mom and dad on this piece of paper.

On appeal, the state argues that Connelly's testimony is relevant and admissible under Tennessee Rule of Evidence 803(3), which is commonly referred to as the "state of mind" hearsay exception, it asserts that Connelly's testimony is admissible to rebut the appellant's assertion in his opening statement that his marriage to the victim was "a good

marriage and a happy marriage" and that the appellant and the victim loved each other. The state maintains that because the marital relationship of the appellant and the victim was an issue at trial, Connelly's testimony is relevant.

The appellant, however, argues that Connelly's testimony is not relevant and is "rank hearsay." The appellant asserts that the state is trying to use "the deceased's state of mind to prove the defendant's state of mind." The appellant further contends that Connelly's testimony was "extremely prejudicial with respect to the issue of premeditation and deliberation" because the appellant could not confront the deceased, thereby violating his constitutional rights.

The first step is to determine whether Peter Connelly's testimony is relevant. Tennessee Rule of Evidence 401 states: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The relationship between the appellant and the victim was an issue at trial. On appeal the state relies solely on the fact that the appellant opened the door by declaring in his opening statement that he and the victim had "a good marriage and a happy marriage." However, other instances of trouble in the couple's marriage also made their relationship relevant at trial. The victim's mother, Catherine Trainor, and Jay Bamette testified that there had been problems in the couple's marriage. Therefore, although the state focuses

solely on the appellant's opening statement, the couple's marital relationship would still have been an issue based upon the testimony of these two witnesses. Consequently, we find, as did the trial court, that Connelly's testimony was relevant.

Next, we must determine whether the testimony is hearsay. On appeal, the state argues that Connelly's testimony is admissible under Tennessee Rule of Evidence 803(3), the "state of mind" hearsay exception as some indication of the victim's feelings toward the appellant. The state, however, at trial relied on State v. Howell, No. 03C01-9406-CR-00203 (Tenn. Crim. App. at Knoxville, Feb. 12, 1996), perm. app. denied, concurring in results only, (Tenn. July 8, 1996), arguing that Connelly's testimony of the victim's statements was being offered to prove premeditation and deliberation by the appellant.

Tennessee Rule of Evidence 801 (c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tennessee Rule of Evidence 803(3) states that the following types of statements are admissible as exceptions to the hearsay rule:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed

unless it relates to the execution, revocation, identification, or terms of declarant's will.

The following provides an interpretation of the 803(3) state of mind hearsay exception:

> In order for Rule 803(3) to apply, the declarations of mental condition should expressly assert the declarant's mental state. Common examples include statements of love ('I love Karen'), fear ('I'm afraid Adolph will kill me'), and hate ('I hate him'). Many times a statement does not literally assert the declarant's mental state when offered to prove that mental state. If so, the statement should be admitted as nonhearsay.... in any event, both circumstantial declarations of mental state and express declarations of mental state are admissible.

Nell P. Cohen et al., Tennessee Law of Evidence § 803(3).2, at 540 (3d ed. 1995) (emphasis added).

We begin with the fact that the state offered Connelly's testimony at trial for one purpose, to prove the appellant's premeditation and deliberation, yet on appeal, contends that it was offered to rebut the appellant's assertion that he and the victim had "a good marriage and a happy marriage." At trial, the state relied on Howell, which

indicates that Rule 803(3) permits a victim's statement to prove the defendant's state of mind. However, Rule 803(3) does not permit such an interpretation. As noted earlier, the state of mind hearsay exception allows the declarant's state of mind to be proven, and no one else's. Therefore, the state erred by relying on Howell to prove premeditation and deliberation by the appellant.

In its brief, the state also incorrectly asserts that Connelly's testimony was admissible under Rule 803(3), the state of mind hearsay exception. Tennessee Law of Evidence in its interpretation of Rule 803(3) states that "[m]any times a statement does not literally assert the declarant's mental state when offered to prove that mental state. If so, the statement should be admitted as nonhearsay," Id. Section 801.7 of Tennessee Law of Evidence, which discusses nonhearsay declarations to prove circumstantially the declarant's mental state, states that utterances offered for the underlying implied assertion that is circumstantially implicit in the literal spoken or written words.... [are] often viewed as nonhearsay." Id. § 801.7, at 498-99 (emphasis in original); see State v. Goins, No. 03CO1 -9502-CR-00026 (Tenn. Crim. App. at Knoxville, filed July 30, 1996).

Nowhere in Peter Connelly's testimony is there an express assertion of the declarant's, that is the victim's, mental state. Connelly's testimony does, however, contain statements by the victim that circumstantially imply her mental state toward the appellant at the time the statements

were made. The key to determining whether a statement is hearsay is the purpose for which it is offered. Therefore, had the state at trial offered the statements of the victim to rebut the appellant's assertion in his opening statement that he had a good marriage, Connelly's testimony would have been admissible as nonhearsay for a circumstantial implication of the victim's mental state. However, the state did not offer Connelly's testimony for that purpose at trial, but instead offered his testimony of the victim's state of mind to prove the appellant's state of mind as to premeditation and deliberation. This was error. However, because the evidence as to premeditation and deliberation is overwhelming, we conclude that any error was harmless. Tenn. R. Crim. P. 52(a).

MOTION FOR A MISTRIAL

In his last issue, the appellant argues that the trial court erred by not granting his motion for a mistrial. The appellant moved for a mistrial after the testimony of Penny Mays, one of the victim's instructors at Shelby State Community College. She testified that during a conversation she had with Michelle Roe the day before she was killed, Michelle indicated to her that she was fearful, although she did not indicate why or of whom she was frightened.

At trial, the state argued that Ms. Mays testimony was similar to Peter Connelly's testimony in that it showed that in the days preceding the victim's death she was fearful and that she asked Ms. Mays, as well as Mr. Connelly, to call her

parents if she did not show up for class on Friday. The defense, however, at trial argued that Ms. Mays testimony "was more general [than Connelly's testimony]--it was much more vague. There was not a threat to kill . . .." The defense moved to have Ms. Mays' testimony stricken, and the trial court agreed. The trial court then instructed the jury to disregard Ms. Mays' testimony.

In his brief, the appellant argues that the trial court could not "unring the bell" by simply telling jurors not to consider the testimony of Ms. Mays once they had heard it. The appellant contends that Mays' testimony was extremely prejudicial regarding the issue of premeditation and deliberation. The state however argues that because the trial judge instructed the jury to ignore Mays' testimony, the jury is presumed to have followed his instructions. Thus, the state maintains that the trial court correctly denied the appellant's motion for a mistrial.

The decision whether to grant a mistrial is within the sound discretion of the trial court. State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987). The trial judge's decision will not be overturned on appeal unless there was an abuse of that discretion. Id. A mistrial is usually appropriate in a criminal case only where there is a "manifest necessity." Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict. Id. The

burden of establishing a "manifest necessity" lies with the appellant.

The appellant conceded at trial that Ms. Mays' testimony was extremely general and vague, yet now argues that her testimony was so prejudicial that a mistrial should have been granted. The trial judge instructed the jury "to disregard the testimony of the last witness, Miss Mays. You are not to consider that testimony, at all, for any purpose whatsoever. You can totally disregard that testimony." Based upon the record before us, we conclude that Ms. Mays' testimony did not preclude an impartial verdict by the jury. Accordingly, this issue is without merit.

CONCLUSION

After careful consideration of the issues presented by the appellant, we affirm his conviction of first degree murder.

/s/ Paul G. Summers
PAUL G. SUMMERS, Judge

CONCUR:
/s/ John H. Peay
JOHN H. PEAY, Judge

/s/ David G. Hayes
DAVID G. HAYES, Judge

AMENDMENT IV

CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV, CL. 1

CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.